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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA P. LAVANT,

Petitioner,

VS.

ST. JOSEPH'S HOSPITAL,

AND GEORGIA LIONS EYE BANK, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

JOHN R. CALHOUN
CALHOUN, DONALDSON & COX, P.C.
302 East Oglethorpe Avenue
Savannah, Georgia 31401
(912) 232-4436
Attorneys for Petitioner
January 27, 1986

Of Counsel

BIGNAULT, HAAS & BALLEW
Post Office Box 9714
Savannah, Georgia 31412

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

Whether a state statute which permits the removal of corneal tissue from decedents without providing for notice to the next-of-kin or a meaningful opportunity for the next-of-kin to impose objections to such removal violates the due process clause of the fourteenth amendment to the United States Constitution?

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Patricia P. Lavant petitions this Court that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia entered on October 29, 1985.

OPINIONS BELOW

On October 5, 1984, the Honorable David R. Elmore, Senior Judge of the State Court of Chatham County, Georgia, issued an order denying Respondent St. Joseph Hospital's Motion for Summary Judgment. (a. 6a-11a). On January 17, 1985, the trial court de-

cided Cross-Motions for Summary Judgment filed by Petitioner and Respondent Georgia Lions Eye Bank, Inc. Judge Elmore granted Petitioner's motion and denied Respondent's motion. (a. 12a-15a). These Orders were not reported.

On October 9, 1985, the Supreme Court of Georgia issued an opinion reversing the trial court and entering judgment for Respondents St. Joseph's Hospital and Georgia Lions Eye Bank Inc.(a. 1-5a). This opinion is reported as 255 Ga. 60 (1985). The opinion of the Supreme Court of Georgia as originally rendered is reproduced and marked as Appendix A to this petition. The orders of the Honorable David R. Elmore, Senior Judge of the State Court of Chatham County, Georgia, are reproduced and marked as Appendix B to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of a judgment of the Supreme Court of Georgia entered on October 9, 1985. A petition for rehearing was denied on October 29, 1985. The present petition was filed on January 27, 1986. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3) (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The United States Constitution, Amendment XIV, Section 1;

> [N]o State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

2. The United States Constitution, Amendment V;

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

3. O.C.G.A. Section 31-23-6(b);

(b)(1) Upon a request from an authorized official of an approved eye bank for corneal tissue to be used for transplants or research, a coroner, a medical examiner, hospital, funeral director, or an authorized official acting for the coroner may permit the removal of the corneal tissue of a decedent by individuals designated by the eye bank for delivery to the eye bank for such purposes if all of the following conditions are met:

(A) The decedent from whom the tissue is to be taken is under the jurisdiction of a coroner or medical examiner pursuant to Code Section 45-16-27;

(B) No objection by the decedent during his lifetime or, after his death, by the appropriate person listed in paragraph (2) of this subsection is known to the coroner, medical examiner, or authorized official acting for

the coroner at the time the tissue is removed; and

(C) The person designated by the eye bank to remove the tissue is a person authorized to do so under Code Section 31-23-5.

(2) Objection to the removal of corneal tissue may be made known to the coroner, medical examiner, hospital, funeral director, or authorized official acting for the coroner by the decedent during his lifetime or by the following persons after the decedent's death:

(A) The decedent's spouse;

(B) If no spouse survives him, any of the decedent's adult children;

(C) If no adult children or spouse survive him, either of the decedent's parents;

(D) If no parents, adult children, or spouse survive him, any of the decedent's brothers or sisters; or

(E) If none of the foregoing survive him, the decedent's next of kin.

(3) No coroner, medical examiner, hospital, funeral director, or authorized official acting for the coroner authorizing the removal of corneal tissue nor any eye bank, its personnel, or other person requesting or participating in the removal of corneal tissue for the eye bank shall be liable in any civil or criminal action for removing corneal tissue from a decedent and using same for transplant or research purposes without obtaining

prior consent from any individual listed in paragraph (2) of subsection (b) of this Code section if such individual failed to object prior to such removal as authorized in this Code section and the removal was in accordance with this Code section. (Code 1933, Section 88-2010, enacted by Ga. L. 1978, p. 811, Section 1; Ga. L. 1982, p. 3, § 31.)

STATEMENT OF THE CASE

Petitioner Patricia P. Lavant, the natural mother of Brook A. Lavant, a thirteen month old infant who died of respiratory arrest or "crib death" on April 21, 1983, instituted suit in the State Court of Chatham County, Georgia. Petitioner sought damages for the taking or "harvesting" of her deceased child's corneas by employees, personnel, or agents of St. Joseph's Hospital and the Georgia Lions Eye Bank, Inc.

The record reflects the following sequence of events:

(a) 2:55 p.m. Petitioner was first alerted to a problem with her child when she received a call from her sitter. (r. supp 22). The sitter advised that the child would not awaken and was not breathing. (r. supp 22).

(b) 3:22 p.m. Ambulance and Petitioner arrive at Respondent St. Joseph's Hospital's emergency room (r. supp 23).

(c) 3:40 p.m. Brook A. Lavant pronounced dead (r. supp 22).

(d) 3:50 p.m. County Coroner notified of death by Hospital personnel. Coroner requests a cause of death autopsy and advises that the Georgia Lions Eye Bank

Inc. should be notified regarding the removal of the child's corneas. (r. supp 22).

(e) 6:16 p.m. "Harvest" of cornea completed by Georgia Lions Eye Bank Inc.'s representative. (r. supp 55).

During the hospital's treatment of their child, Petitioner and her husband remained in the designated waiting area. (r. supp 24). After the child's demise, the parents were notified of the death by the attending emergency room physician. (r. supp 24). Due to the child's sudden death, hospital personnel informed Petitioner that an autopsy would probably be performed. (r. supp 26). When Petitioner's husband objected to the autopsy, he was advised that the County Coroner would make the determination (r. supp 27).

Petitioner was not consulted or notified of the Georgia Lions Eye Bank Inc.'s intention to "harvest" her son's corneas., (r. supp 38). The excision of the corneas was not, however, part of the autopsy and in no manner aided the coroner's report of the cause of death. (r. 162).

Petitioner first suspected that her child's corneas had been removed when she received a copy of the hospital's emergency room report. (r. supp 38). These suspicions were confirmed upon her subsequent receipt of the autopsy report dated May 31, 1983, over one month after the date of Brook A. Lavant's death. (r. supp 40)

On July 16, 1984, Petitioner's complaint was filed in the State Court of Chatham County. Subsequently, both Respondents filed Motions for Summary Judgment and alleged that their agents acted under color

of O.C.G.A. Section 31-23-6(b) "The Medical Examiners Law." This statute authorizes the removal for transplant of the corneal tissue of decedents if no objection is made by the decedent in his life time or by his next of kin after death. Petitioner filed a Motion for Summary Judgment on the ground that the Georgia statute violated the due process clauses and the United States and Georgia Constitutions. The Trial Court denied the Respondents' Motions, granted Petitioner's Motion, and held O.C.G.A. Section 31-23-6(b) unconstitutional as violative of due process guarantees.

The Respondents directly appealed to the Supreme Court of Georgia. Justice Charles L. Weltner, writing for the majority, reversed the trial court's decision and held that the Respondents' Motions for Summary Judgment should have been granted, finding that the petitioner had no property interest protected bythe constitutional guarantees of due process.

Petitioner's Motion of Reconsideration was denied by the Supreme Court of Georgia on October 29, 1985. Upon consideration of Petitioner's Motion for a Stay of Remittitur in order that an appeal or an application for Certiorari might be filed in this Court, Justice Weltner granted the Motion subject to certain conditions as set forth in Appendix D. Petitioner now seeks a Writ of Certiorari to review the Order of the Supreme Court of Georgia.

REASONS FOR GRANTING THE WRIT

1. The case presents an important question as to whether a state statute which permits the removal of corneal tissue from decedents without providing for notice to the next-of-kin or a meaningful op-

opportunity for the next-of-kin to impose objections to such removal violates the due process clause of the fourteenth amendment to the United States Constitution.

During the late 1970's and throughout the 1980's state legislatures enacted statutes known as "Medical Examiners Laws." These statutes permit the removal of corneal tissue from the eyes of a decedent under certain circumstances. The law as enacted in nine states, including Georgia, allows the tissue removal if no objection is made by the decedent's next of kin.[1] Georgia's version of the statute does not, however, provide a mechanism for notice to the next-of-kin of their right to object to the harvest of corneal tissue. While other states have adopted cornea removal statutes requiring notice to the next of kin of their right to object in view of the Georgia court's decision that no notice need be provided, the remaining state legislatures will enact laws more like the Georgia Statute than like those states' statutes which provide meaningful notice to the next-of-kin. For purposes of determining whether the challenged statute violates due process protections, the Court should grant the writ.

The next of kin's interest in the decedent's corneas arises from two sources. First, the statute itself creates the interest. By its terms the Medical Examiner's Law affords the next of kin the right to object to

---

[1]The States, other than Georgia, which have such Statutes are California, Cal. Health and Safety Code Section 7151.6 (West Supp. 1984); florida, Stat. Section 732.9185 (1983); Kentucky, Kentucky Revised Stat. Section 311.187 (1983); Michigan, Mich. Comp. Laws Ann. Section 333.10202 (Supp 1985); Ohio, Ohio Rev. Code Ann. Section 2108.50, 60 (Page Supp. 1984); Texas, Tex. Rev. Civ. Stat. Ann. Art. 4590-4 (Vernon Supp. 1986); and West Virginia, W. Va. Code Section 16-19-3a (Supp. 1985).

the removal. In addition, the living have an interest recognized by our society in the disposition of their dead. The courts have historically recognized this right to insure the integrity of the remains of one's decedent as a liberty interest, a privacy interest, or a property interest.[2] The characterization is not of primary importance since the interest described is by its very nature, unique and not suscepitble to strict definition.

The interest of the next of kin is sufficient to trigger due process protections. The due process clause of the Fourteenth Amendment to the United States Constitution requires that the state provide the next of kin notice and an opportunity to be heard. The fundamental requisite of procedural due process is notice and a meaningful opportunity to be heard. *Goldberg vs. Kelly,* 397 U.S. 254, 90 SC 1011, 25 L. Ed., 2d 287 (1970).

The challenged statute authorizes medical examiners and others to remove corneas from decedents without first notifying the next of kin of their intention to do so, without first inquiring whether the next of kin have an objection, and without first requiring the consent of the next of kin to the removal.

---

[2]The trial court in this case found that Petitioner held a property interest in her deceased child's corneas. Appendix B & C. In *State Court of Florida, et al* v. *Wade Powell, et ux, et al.,* (pending before the Supreme Court of Florida; Case No. 67,755), the Circuit Court found that the Appellees as next of kin held a property, liberty, and privacy interest in their decedents' corneas. A similar privacy argument was asserted by the Plaintiff and rejected by the Court of Appeals of Michigan in *Tillman* v. *Detroit Receiving Hospital et al,* 360 N.W. 2d 275 (Mich. App. 1984).

No system exists for allowing persons to make objections known to the removal of corneal tissue. The next of kin's right to object cannot then be meaningfully asserted.

The law as enacted in Georgia and other states is invalid. Although it recognizes the right to object, it is designed to preclude objection. In a case decided by the Court during its March 1985 term, *Cleveland Board of Education vs. James Loudermill, et al.* 470 U.S. 84 L. Ed. 494, 106 S. Ct. 494 (1985), the Court emphasized the point that a state legislature cannot prescribe methods or procedures for making an objection without reference to the Constitution's due process standards. The Ohio statute at issue in *Loudermill* recognized a property right in individuals to continued employment and specified procedures for discharge. Those procedures were followed in the termination of Mr. Loudermill. The statute did not provide for any pretermination opportunity to object.

Justice White, in delivering the majority opinion, described the basis of the due process clause as follows:

> The essential requirements of due process. . . .are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U Pa L Rev 1267, 1281 (1975). *Id.*

The court concluded by finding that in addition to the statutory administrative procedures, due process

required a pre-termination opportunity to respond. *Loudermill, supra.*

The challenged statute's provision that the next of kin may object if he or she somehow knows to do so, without requiring any form of notice does not pass constitutional muster under established notions of procedural due process. The statute intrudes upon the right of free choice and decisions of fundamental importance to the family. This court should grant a writ of certiorari to review the statute's provisions and to discontinue the trend of state legislatures enacting this version of the Medical Examiners Law.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari be issued to review the order of the Supreme Court of Georgia in this case.
Dated: January 27, 1986

Respectfully submitted,

JOHN R. CALHOUN
CALHOUN, DONALDSON & COX
302 East Oglethorpe Avenue
Savannah, Georgia 31401
(912) 234-1628
Attorney for Petitioner

Of Counsel:

BIGNAULT, HAAS & BALLEW
Post Office Box 9714
Savannah, Georgia 31412

APPENDIX

APPENDIX "A"

In the Supreme Court of Georgia
Decided: Oct 9, 1985

42351. GEORGIA LIONS EYE BANK, INC. et al. v. LAVANT. WELTNER, Justice

This appeal is from an order of the State Court of Chatham County holding unconstitutional OGCA § 31-23-6 (b)(1), which authorizes, under specified circumstance,[1] removal for transplant of the corneal tissue of decedents if no objection is made by the decedent in his life or by his next-of-kin after death.

This law was enacted by a virtually unanimous General Assembly in 1978. The record indicates that before its passage, approximately 25 corneal transplants were performed each year. In 1984, however, more than 1000 persons regained their sight through transplants.

Pursuant to this Code section, officials of the Georgia Lions Eye Bank removed during autoposy the corneal tissue of an infant, who had died of sudden infant death syndrome. While the parents of the infant did not object, there was no notice of the intended removal, nor any realistic opportunity to object. Sometime later, the mother discovered for the first time that the corneal tissue had been removed. She brought suit against St. Joseph's Hospital and the Georgia Lions Eye Bank for the wrongful removal of the tissue.

The court held the statute violative of due process in that it deprives a person of a property right in the corpse of his next-of-kin, and fails to provide notice and an opportunity to object.

---

[1]OCGA § 45-16-27 (a) (1) provides, in part, that coroners shall require a post-mortem examination or autopsy when any person dies "suddenly when in apparent good health."

1. In the earlier days of the common law, so Blackstone avers, no property right existed relative to a dead body, and matters concerning corpses were left to the ecclesiastical courts. "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead and buried." 2 W. Blackstone, Commentaries *429 (T. Cooley, ed. 1899).

Because there were no ecclesiastical courts in this country to resolve matters relating to corpses, the courts conceived the notion of "quasi-property right," when referring to the interest of relatives in the bodies of their next-of-kin. Dean Prosser noted: "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer." W.L. Prosser and W.P. Keeton, *Prosser and Keeton on Torts,* p. 63 (5th ed. 1984).

In Georgia, an early case considering this interest of next-of-kin is *Louisville Railroad Co. v. Wilson,* 123 Ga. 62 (51 SE 24) (1905). The precise nature of the interest was never defined, although we held that some type of claim was stated. However, in *Pollard v. Phelps,* 56 Ga. App. 408, 415 (193 SE 102, 107) (1937), the court held that "[a]t common law no property right was held to exist in a dead body; and though this view is still maintained in a strict sense, the courts of civilized and Christian countries regard respect for the dead as not only a virtue but a duty, and hold that, in the absence of testamentary disposition, a quasi property right belongs to the husband or wife, and, if neither, to the next of kin." See also *Rivers v. Greenwood Cemetery, Inc.,* 194 Ga. 524, 525 (22 SE2d 134) (1942), wherein we held "that a dead body is quasi property over which the relatives of the deceased have rights which the courts will protect."

Thus, it can be seen that in Georgia, there is no *constitutionally* protected right in a decedent's body. Rather,

the courts have evolved the concept of quasi property in recognition of the interests of surviving relatives in the possession and control of decedents' bodies. We do not find this common law concept to be of constitutional dimension.

2. A right of action existing at common law may be modified or abrogated by the legislature. *Teasley v. Mathis*, 243 Ga. 561 (255 SE2d 57) (1979).

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134 (24 LE 77) (1876).

3. "The preservation of the public health is one of the duties devolving upon the State as a sovereign power. In fact, among all the objects sought to be secured by governmental laws, none is more important than the preservation of the public health. . . .Health regulations are of the utmost consequence to the general welfare; and if they are reasonable, impartial, and not against the general policy of the State, they must be submitted to by individuals for the good of the public, irrespective of pecuniary loss." *Abel v. State*, 64 Ga. App. 448, 452-453 (13 SE2d 507) (1941).

Certainly, the General Assembly has it within its power, in the interest of the public welfare, to authorize this procedure, which yearly benefits hundreds of Georgians.

The motions for summary judgment of the hospital and the eye bank should have been granted.

Judgment reversed. All the Justices concur, except Marshall, P.J., who dissents.

42351. GEORGIA LIONS EYE BANK, INC. et al. v. LAVANT

MARSHALL, Presiding Justice, dissenting.

While I am heartily in favor of the purpose of the statute in question to provide corneal tissue for transplants, I am constrained to hold that the statute violates the due process provisions of the Constitutions of Georgia and the United States. The statute fails to provide notice to the next of kin and a realistic opportunity to object to the corneal tissue removal, and, therefore, in my opinion, violates the fundamentals of due process.

I respectfully dissent.

APPENDIX "B"

IN THE STATE COURT OF CHATHAM COUNTY

GEORGIA

CIVIL ACTION NO. 83-4123

PATRICIA P. LAVANT,

Plaintiff

vs.

ST. JOSEPH'S HOSPITAL and GEORGIA LIONS EYE BANK, INC.,

Defendants

ORDER ON DEFENDANT ST. JOSEPH'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's child died of sudden infant death syndrome. At the autopsy the child's corneas were removed without notice to plaintiff. Plaintiff alleges that defendant St. Joseph's was responsible in providing the means and facilities for removal of the corneas. St. Joseph's relies on O.C.G.A. §31-23-6(b). In relevant part, that subsection reads:

> (1) Upon a request from an authorized official of an approved eye bank for corneal tissue to be used for transplants or research, a . . . hospital . . . may permit the removal of the corneal tissue of a decedent by individuals designated by the eye bank for delivery to the eye bank for such purposes if all of the following conditions are met:
>
> > (A) The decedent from whom the tissue is to be taken is under the jurisdiction of a coroner or medical examiner pursuant to Code §45-16-27; (B) No objection by the decedent during his lifetime or, after his death, by the appropriate person listed in paragraph (2) of this subsection is known to the

> coroner, medical examiner, or authorized official acting for the coroner at the time the tissue is removed; and (C) The person designated by the eye bank to remove the tissue is a person authorized to do so under Code Section §31-23-5.
>
> (2) Objection to the removal of corneal tissue may be made known to the coroner, medical examiner, hospital, funeral director, or authorized official acting for the coroner by the decedent during his lifetime or by the following persons after decedent's death:
>
> (C) If no adult children or spouse survive him, either of the decedent's parents. . . .
>
> (3) No . . . hospital . . . or other person requesting or participating in the removal of corneal tissue for the eye bank shall be liable in any civil or criminal action for removing corneal tissue from a decedent and using same for transplant or research purposes without obtaining prior consent from any individual listed in paragraph (2) of subsection (b) of this Code section if such individual failed to object prior to such removal as authorized in this Code section and the removal was in accordance with this Code section.

Defendant St. Joseph's has satisfactorily shown, by affidavit of the coroner, that it has complied with these provisions and should therefore be immune from suit. Plaintiff contends, however, that the statute violates the Due Process clause of the Georgia Constitution by failing to offer her an opportunity to object. Ga. Const., art. I, section 1, paragraph 1. Since the requirements of the statute have been fulfilled, this issue is ripe for determination.

The first question must be whether a property right is involved. The statute was enacted in 1978 (Georgia L. 1978, p. 811, Section 1), and has been amended in three inconsequential ways since then. The rules governing

Georgia's Department of Human Resources track the relevant language word-for-word. Official Compilation of Rules and Regulations of State of Georgia, Rules of Department of Human Resources, Chapter 290-5-7-.08(2) (1983 revision).

Although this particular statute has not yet been construed by Georgia's appellate courts, this sort of question was first addressed in *Louisville & Nashville Railroad Co. v. Wilson,* 123 Ga. 62, 51 S.E. 24 (1905). There, defendant Railroad damaged the body, coffin and shroud of plaintiff's deceased husband by leaving it in the rain until "soaked and otherwise mutilated." *Id.* at 63. The court held that a cause of action had been set out by the petition. In so holding, the court discussed a number of Georgia and foreign decisions which satisfied it that plaintiff had a property right in the body of her husband sufficient to maintain a cause of action for damage done to it. At one point, the court quoted a New York case stating:

> It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. . .The world does not contain a tribunal that would punish a son who should resist, even unto death, any attempt to mutilate his father's corpse, or tear it from the grave for sale or dissection; but where would he find the legal right to resist, except in his peculiar and exclusive interest in the body? The right to the repose of the grave necessarily implies the right to its exclusive possession.

Id. at 65. Before stating its conclusion that a property right was involved, the court gave this relevant quote from a Massachusetts decision:

> An action against a hospital for an autopsy performed upon the dead body of a child without the consent of the father, who was the natural guardian, and who intrusted the child to the hospital for treatment, does not fail on the ground

> that there was no right of property in the dead body.

Id. at 68.

A similar conclusion was reached by the Georgia Court of Appeals in *Pollard v. Phelps*, 56 Ga. App. 408, 193 S.E.102 (1937). In addition to quoting the *Wilson* case, the court set out this rich paragraph:

> As was well said in *Kyles v. Southern Ry. Co.*, [North Carolina cite omitted]: "Respect for the dead is an instinct that none may violate. The democracy of death is superior to the edicts of kings. Rizpah became forever famous among her kind when she defied the King of Israel who would treat the bodies of her dead with contempt, and Sophocles had immortalized Antigone, who vindicated the like sentiment of human nature as a higher law than that of her sovereign. The deceased may have moved in the humbler walks of life; but to the plaintiff he was husband and the father of her children. It was her right, old as time, as broad as humanity, and as deep as the heart of man, that his mortal remains should be treated with due respect." It is to the credit of our civilization that law, the vigilant and final sentinel, stands guard about our withered form, when the spirit has flown to that immortality for which we ardently do hope.

Pollard, supra, at 417. The court's conclusion was stated as follows:

> At common law no property right was held to exist in a dead body; and though this view is still maintained in a strict sensé, the courts of civilized and Christian countries regard respect for the dead as not only a virtue but a duty, and hold that, in the absence of testimentary disposition, a quasi property right belongs to the husband or wife, and, if neither, to the next of

> kin. [cite omitted] It includes the right to have the body delivered to such entitled person in the same condition in which it was when death supervened.

Id. at 415-16. This finding was later approved in *Lumley v. Pollard,* 61 Ga. App. 681, 7 S.E.2d 308 (1940).

These cases, of course, were based on common law, and make no mention of Constitutional Due Process considerations. One might argue, then, that the statute under consideration is simply a modification of the common law. However it still must comply with Constitutional Due Process requirements. We have established that plaintiff had a property right in her child's body in the same condition in which it was when death supervened. It is clear from the language of the statute, quoted above, that it authorizes a deprivation of a portion of this right. The next question to be answered is whether the process by which this deprivation takes place is sufficient, or "due." Our inquiry proceeds under Georgia's Constitution, Article I, Section 1, Paragraph 1, stating, "No person shall be deprived of life, liberty, or property, except by due process of law." We see no need to resort to the ultraflexible interpretations given to the Fourteenth Amendment to the Federal Constitution.

It is often said that notice of the proceeding and an opportunity to be heard in opposition are required to satisfy the Due Process clause. *See, e.g., Keenan v. Hardison,* 245 Ga. 599(2), 266 S.E.2d 205 (1980) (hearing before suspension of driver's license). It seems to us, though we do not so hold, that relatively little would be required to satisfy this in these cases. Specifically, the only thing the statute lacks is provision for the appropriate person to be given the opportunity to make an objection. To require provision for an objection to be made might damage the purpose of the statute, in view of the fact that to be useful, corneas must be removed within four to six hours of death. (Deposition of Phillips D. Hamilton, II, pp. 20, 23). However, the addition of this small requirement would entirely satisfy the Due Process Clause.

In holding the statute's failure to offer an opportunity to object unconstitutional, we rely on the principle of *Buchanan v. Heath,* 210 Ga. 410, 80 S.E.2d 393 (1954). In that case, the court scrutinized a statute requiring section foremen on railroads to post notice of all marks and brands of cattle allegedly killed on their section in recent weeks. If they failed to post the notice for a particular brand, the statute held them liable for double the damage done to that brand of cattle. The court held the statute unconstitutional on Due Process grounds to the extent that it held foremen liable even for failure to report cattle injuries of which they had no knowledge. Similarly, the statute under consideration here would require plaintiff to have objected to the cornea removal even though she was unaware it was to be performed. We also find support in two other Code Sections. In O.C.G.A. §45-16-28, consent is required as a prerequisite to any autopsies not mandated by Georgia law. Secondly, Georgia law also requires that, "Any donation of a person's eyes or any part thereof shall be made in accordance with Article 6 of Chapter 5 of Title 44, [Georgia's Anatomical Gift Act]." O.C.G.A. §31-23-2. That Article carefully protects the concept of the good faith giving of anatomical parts and therefore reflects a high regard for the consent of the donor or his appropriate representative. Because we find the failure of the statute under consideration to provide an opportunity for an appropriate objection unconstitutional,

Defendant's Motion for Summary Judgment based on O.C.G.A. §31-23-6 is hereby denied.

SO ORDERED this 5 day of October, 1984.

DAVID R. ELMORE, JUDGE
STATE COURT OF CHATHAM COUNTY

APPENDIX "C"

IN THE STATE COURT OF CHATHAM COUNTY
GEORGIA
CIVIL ACTION NO. 83-4123
PATRICIA P. LAVANT,

Plaintiff

vs.

ST. JOSEPH'S HOSPITAL and GEORGIA LIONS EYE BANK, INC.,

Defendants

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The facts and posture of this case were stated in our previous order, dated October 5, 1984. That order denied defendant St. Joseph's motion for summary judgment which motion was based on the statutory protection of O.C.G.A. §31-23-6(b). That subsection allows the removal of a decedent's corneal tissue if, before the removal, the appropriate person does not make any objection to the coroner, medical examiner, or authorized official acting for the coroner. Our previous order declared this subsection unconstitutional to the extent that it provides no means for notice to the appropriate person of his right to object to the removal.

On these cross-motions, plaintiff and defendant Georgia Lions Eye Bank, Inc. seek summary judgment against one another on the same issue as was decided in our previous order. We stand on the reasoning given in that order, but since the argument on these motions raised some considerations not raised on the previous motion, we will address these below.

Defendant's most forceful argument is that if the State has the right to cause the virtual mutilation of the body in the performance of an autopsy, which plaintiff acknowledges, then the State can authorize the removal of corneas,

since that causes negligible damage compared to that caused by an autopsy. The *purposes* of the two operations are completely different, however. As revealed in the deposition testimony given by Chatham County's coroner, Dr. James C. Metts, Jr., the purpose of an autopsy is to determine the cause of death, which often also serves the cause of justice. Plaintiff concedes that the State may infringe upon her property right in her child for this purpose. As Dr. Metts stated:

> If an autopsy is necessary for the cause of justice, then that is not for the family to withhold; and that is as it should be. Because obviously, the people who would object to autopsies would be the people who have the most to lose by them. And there are those who might have perpetrated it who wish to have it concealed. . . .

Deposition of Dr. Metts, p. 38. Elsewhere Dr. Metts said, "Anytime that a young child is brought in, in which there is a suspicion of child neglect or child abuse, an autopsy will be done. There is no debating that point. *The autopsy is the child's last chance of justice.*" (p. 31) (emphasis added) Obviously then, any objection to the mutilation caused by autopsy can be overridden by the goal of determining the cause of death. But removal of the corneas falls outside this justification for destruction of the body. Dr. Metts stated, "The removal of the corneas would not aid the determination of the [cause of] death in any fashion." (p. 42)

The benefits of the two operations also accrue to different people. Whereas determining the cause of death would ordinarily be considered beneficial to a person in plaintiff's position, removal of the corneas in this case presumably benefited someone unknown to plaintiff. And this was at the expense of plaintiff's right to a body not mutilated in a way unnecessary to determining the cause of death. While a jury might find that the expense to plaintiff was no damage at all, we cannot make such a determination on a summary judgment motion.

It further bears pointing out that the right asserted by plaintiff in this case can, in some cases, override even the performance of an autopsy. Where an autopsy is not required by law, the consent of the person assuming custody of the body for purposes of burial must be obtained before an autopsy is performed. O.C.G.A. §45-16-28.

The rest of defendant's arguments dwell heavily on the enormous benefits procured by the statute in question. Defendant avers that if it is declared invalid, the approximately 1,000 cornea transplants in Georgia per year will be reduced to between 300 and 400, and that the quality of available corneal tissue will also decline. All of these altruistic arguments are well and good. But in this tribunal, they cannot circumvent the statute's failure to provide for notice to plaintiff so that she might voice the objection she has made in this case before it is too late.

Defendant's projections of the consequences of our ruling seem exaggerated. It argues that if the statute is declared invalid, the number of corneal transplants will decline by two-thirds. We can appreciate that such a decline would occur if the coroner were stripped of *all* authority to allow the taking of corneal tissue even if a a person such as plaintiff has consented. But there is no evidence in the record showing how many corneas would be lost by simply requiring the coroner to obtain consent before allowing their removal. This, of course, is the operative question, though we can also appreciate the problem facing one who must announce, "Your wife has just died, can we have her corneas?" Nevertheless, the decision to consent or object is personal to plaintiff and cannot be made by the courts or the legislature.

The problem with the statute in question is simply that it fails to provide for notice to the appropriate person. It goes to great length to list those who may object, but offers these people no vehicle for discovering their right. Indeed, Dr. Metts was asked, "Do you have any procedure for [a person such as plaintiff] making an objection to you if they wish to do so? I mean, have you set up a format

with any particular hospital?" Dr. Metts responded, "No." (p. 45) Again, Dr. Metts was asked, "Because the time of this child's death on the afternoon of the 21st of April, 1983, and the time of the removal of the corneal tissue, did you become aware of anyone's objections to the removal of the corneal tissue?"Dr. Metts said, "No, sir. There hardly would be any way for that to come up as an issue." (p. 23) This is precisely the failure of the statute.

Finally, the Michigan case relied on by defendant allegedly holding a similar statute constitutional on this point did not address the Due Process argument raised by plaintiff here. The court there simply rejected plaintiff's claim that the Michigan statute violated the right to privacy vested in her by the shady penumbras of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). The Michigan case is neither binding nor persuasive.

Plaintiff's motion is hereby granted and defendant's denied.

SO ORDERED this 17 day of January, 1985.
DAVID R. ELMORE, SENIOR JUDGE
STATE COURT OF CHATHAM COUNTY

APPENDIX D

SUPREME COURT OF GEORGIA
Atlanta, October 31, 1985
The Honorable Supreme Court met pursuant to adjournment.
By Weltner, J.
The following direction was given:
GEORGIA LIONS EYE BANK, INC., ET AL., V. PATRICIA P. LAVANT

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 10-29-85 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that Court.

JUSTICE CHARLES L. WELTNER
SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA,

Witness my signature and the seal of said court hereto affixed
the day and year last above written.

Clerk.

Supreme Court, U.S.
FILED
MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1264

In The
Supreme Court of the United States
October Term, 1985

PATRICIA A. LAVANT,
Plaintiff-Petitioner,
v.
GEORGIA LIONS EYE BANK, INC.,
Defendant-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

WILLIAM B. GUNTER*
EVERETTE L. DOFFERMYRE, JR.
CONSTANCE C. RUSSELL
KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043
(404) 572-6500

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED FOR REVIEW

May a Writ of Certiorari be obtained for review of a state court decision when:

(1) No federal question was ruled upon by the state courts; and

(2) Any federal question that may exist was raised before the appellate court for the first time in a petition for rehearing.

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STATEMENT OF THE CASE

In an order entered on October 5, 1984 on Respondent St. Joseph's Hospital's Motion for Summary Judgment, David R. Elmore, Judge of the State Court of Chatham County, Georgia ruled that Official Code of Georgia Annotated § 31-23-6(b), commonly referred to as "the Medical Examiner's law," was unconstitutional. Judge Elmore based his ruling solely upon the Due Process clause of the Georgia Constitution. In a subsequent order on cross-motions for summary judgment of Petitioner Patricia Lavant ("Lavant") and Respondent Georgia Lions Eyebank, Inc. ("Georgia Lions Eyebank") Judge Elmore reaffirmed his previous order and again found the statute unconstitutional. Georgia Lions Eyebank, Inc. is a non-profit corporation and has no parent or subsidiary corporations.

The issues presented to the Georgia Supreme Court on appeal, as stated by the Georgia Lions Eyebank, were: (1) "does the Medical Examiner's law unconstitutionally deprive plaintiff of any vested right in violation of the Due Process clause of the Georgia Constitution; and (2) did the legislature act within its police power in enacting the Medical Examiner's law." Page 7 of Appellant's Brief to the Georgia Supreme Court.

In her brief to the Georgia Supreme Court, Lavant stated that the issues presented were: (1) "whether appellee held a property interest in the body of her deceased son sufficient to invoke the protection of the Georgia Constitution's Due Process clause and (2) whether the trial court correctly denied appellants' motions for summary judgment where appellants unconstitutionally deprived

appellee of her property interest without prior notice or consent." Page 4 of Lavant's Brief to the Georgia Supreme Court.

No federal question was presented to the Georgia Supreme Court until Lavant moved for a rehearing of the Supreme Court's decision entered on October 9, 1985. The motion for rehearing was denied without opinion.

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SUMMARY OF ARGUMENT

Neither the trial court nor the Supreme Court of Georgia ruled upon the federal constitutional question that Petitioner Patricia Lavant raises in her Petition for Writ of Certiorari. In fact, no federal question was raised in the state appellate process until Lavant moved for rehearing, which was denied. Under such circumstances, this Court lacks jurisdiction and the Writ should be denied.

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ARGUMENT

I. No Federal Question Has Been Ruled Upon By The Georgia State Courts And Thus This Court Has No Jurisdiction Over This Case.

The Petition for Writ of Certiorari should be denied because there has been in this action no ruling on a federal question. Until such a ruling occurs, this court has no jurisdiction to hear the matter. 28 U.S.C. § 1257(3) (1982).

The federal constitutional issue was raised in passing by Lavant in her reply to Respondent, St. Joseph's Hospital's motion for summary judgment. The federal constitutional issue, however, was never ruled upon. In its order declaring the Medical Examiner's law unconstitutional, the court relied solely upon the Georgia Constitution. The court stated "[o]ur inquiry proceeds under the Georgia Constitution . . . . We see no need to resort to the ultraflexible interpretations given to the Fourteenth Amendment to the Federal Constitution." Lavant's Brief Appendix B, Page 10a.

After the court's ruling, Lavant and the Georgia Lions Eyebank filed cross-motions for summary judgment. In its second order, the court reaffirmed the reasoning of the first order and again found the statute unconstitutional. Lavant's Brief Appendix C, Page 12a. No reference was made to the federal constitution in the second order.

When the case was appealed, the Georiga Lions Eyebank and St. Joseph's Hospital stated in their briefs that only Georgia constitutional issues were raised. Lavant did not object to that limitation and, in fact, stated in her brief that the issue before the Court was whether she was entitled to invoke the Due Process clause of the Georgia Constitution. Lavant's brief made no reference to the Federal Constitution and cited no federal cases. In short, the only issues presented to the Georgia Supreme Court were questions arising under the Due Process clause of the Georgia Constitution. The court ruled that "in Georgia, there is no constitutionally protected right in a decedent's body." Lavant's Brief Appendix A, Page 2a.

It is evident from the foregoing facts that since the trial court did not address the federal question and no federal question was originally presented to the Georgia Supreme Court, no state court has ruled on a federal question in this case. Accordingly, there can be no basis for jurisdiction in this Court.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. 493, 496-97 (1981); accord, *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

II. Any Federal Question Which Was Presented To The Georgia Supreme Court Was Not Asserted In A Timely Fashion.

While no federal question was presented to the Georgia Supreme Court prior to its decision, Lavant in her motion for rehearing did raise a federal constitutional issue. By that time, it was too late. As stated in *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935), "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."; *see also, Estate of Wilson v. Aiken Industries, Inc., cert. denied*, 439 U.S. 877 (1978) (Justice Blackmun concurring); *Bloeth v. State of New York*, 82 S.Ct. 661 (1962, U.S.) (Application for stay of execution denied because matters proposed for review not raised until motion for reargument).

———o———

CONCLUSION

The record below establishes that this Court has no jurisdiction over this matter. Therefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted, this 3rd day of March, 1986

WILLIAM B. GUNTER*
EVERETTE L. DOFFERMYRE
CONSTANCE C. RUSSELL

Attorneys for Respondent

OF COUNSEL:

KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043
(404) 572-6500

*Counsel of Record